

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

EZEQUIEL MARTINEZ AS TRUSTEE §
FOR 9539 EVERTON LAND TRUST, §
§
Plaintiff, § Civil Action No. SA-12-CV-785-XR
v. §
§
BANK OF AMERICA, N.A., ET AL., §
§
Defendants. §

ORDER

On this day the Court considered, and hereby takes under advisement, Plaintiff's motion to dismiss without prejudice pursuant to Rule 41(a)(2) (Doc. No. 19).

It appears that Defendant Bank of America's motion for summary judgment is meritorious and that Plaintiff's request to dismiss this case without prejudice is an attempt to avoid an imminent adverse ruling on Defendant's summary judgment motion. The Court therefore finds that an unconditional dismissal of this case without prejudice would cause Defendant to suffer plain legal prejudice. As result, Plaintiff's Rule 41 motion to dismiss cannot be granted unconditionally. *See In re FEMA Trailer Formaldehyde Products Liability Litigation*, 628 F.3d 157, 162-63 (5th Cir. 2010); *Elbaor v. Tripath Imaging, Inc.*, 279 F.3d 314, 317-18 (5th Cir. 2002). Accordingly, the Court hereby provides Plaintiff with the following three options for how to proceed with the litigation of this case:

- The Court will grant Plaintiff's motion to dismiss on the condition that the dismissal of this case be with prejudice;
- The Court will grant Plaintiff's motion to dismiss without prejudice on the condition that Plaintiff reimburse Defendant for the reasonable attorneys' fees that Defendant expended by preparing and filing its motion for summary judgment;

or

- Plaintiff will withdraw his motion to dismiss and file a response to Defendant's motion for summary judgment within 14 days of this Order.

Plaintiff must select one of these three options and notify the Court of his decision by filing a written advisory with the Court by no later than Wednesday, May 22, 2013. If Plaintiff does not file a written advisory with the Court by that date, the Court will conclude that Plaintiff has elected to have the Court grant his motion to dismiss on the condition that the dismissal of this case be with prejudice.

It is so ORDERED.

SIGNED this 15th day of May, 2013.



XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE